BANDAHALA UNDIK A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
RAMLY ALI JCA
MOHTARUDIN BAKI JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: S-05-113-2009]
17 SEPTEMBER 2013 C

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Appeal against conviction and sentence - Dying declaration - Identification of accused - Relevancy of statement - Cause of death - Whether breached hearsay rule - Whether concept of res gestae, dying declaration and provision under s. 32(1)(a) Evidence Act 1950 assisted prosecution to sustain charge - Failure to tender medical or post mortem report - Failure to call medical officer who ascertained cause of death to testify - Whether medical officer's report admitted under s. 32(1)(j) Evidence Act 1950 - Whether cause of death can be ascertained by direct evidence or patent injuries on body - Whether conviction and sentence affirmed* D E

EVIDENCE: *Dying declaration - Admissibility - Evidence Act 1950, s. 32(1)(a) - Whether Evidence Act 1950 defines dying declaration - Whether statement must consists of cause of death or transaction which resulted in death - Whether assisted prosecution to sustain charge of murder - Legal maxim - Nemo moriturus praesumitur mentire* F

This was an appeal by the appellant ('accused') against the decision of the High Court in convicting and sentencing him for murder of one Siti Jainah ('deceased') under s. 302 of the Penal Code. The facts showed that there was no eye witness to the murder. However, while being treated at a clinic for the injuries sustained, the deceased had informed the clinic staff before she died that she was attacked by her uncle whom she identified as "Sailan". The police arrested the accused and also recovered incriminating evidence from the accused which linked him to the murder of the deceased. Among others, the jurisprudence relating to dying declaration was canvassed by the prosecution. The accused, however, argued that the trial judge erred in law or in fact when he failed to appreciate, *inter alia*, that (i) there was no G H I

A medical or post mortem evidence to ascertain what caused the wounds on the deceased; and (ii) the medical officer who ascertained the cause of death was not called to testify.

Held (dismissing appeal; affirming decision of High Court)
B **Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

(1) It is well settled that it is in the hands of the triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. (para 14)
C

(2) The doctor who confirmed that the deceased was dead did not give evidence as he had left the country and his report was admitted under s. 32(1)(j) of the Evidence Act 1950 ('the Act'). The case of *Ismail Hussin v. PP* does not say a
D post mortem report and cause of death affirmed by a medical practitioner is a *sine qua non* to sustain a charge of murder. The cause of death can ordinarily be ascertained by direct evidence or patent injuries on the body though a medical
E report or post mortem report would assist the prosecution to drive home the point of cause of death and will also assist the court to focus on the issue rather than infer other probabilities for the cause of death. The recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is
F sufficient proof of homicidal death of the victim. (para 5)

(3) *Res gestae* and dying declaration stands as an exception to the hearsay rule and when the statement clearly points to the accused, it has a potent effect not only on the identification
G but also as to the cause of death. (para 5)

(4) Under the English law, a dying declaration means a statement made by a deceased at the time of dying as to the cause of his death or as to any of the circumstances of the transaction
H which resulted in his death. However, the Act does not define dying declaration, its concept or limitation save that it makes similar statements in the widest form relevant. Section 32(1)(a) of the Act deals with the relevancy of statements of victims of crime in which their cause of death is in question. The
I statement must be one which states the cause of the victim's

death or state any of the circumstances of the transaction which resulted in his death. Our Act is much wider in scope than the common law. (paras 7-9)

(5) Dying declaration or a s. 32(1)(a) statement is relevant and in consequence becomes admissible notwithstanding that it breaches the hearsay rule. The reason is based on the legal maxim "*nemo moriturus praesumitur mentire*" which means a person who is about to die would not lie. On the facts, the concept of *res gestae*, dying declaration and the provision of s. 32(1)(a) by itself or in composite had strongly assisted the prosecution to sustain the charge for murder which had been appropriately considered by the learned trial judge through the narration of events to attract the relevant jurisprudence to sustain the charge. There were sufficient materials to support the charge and the view taken by the trial court on the relevant issues was reasonable. The court had also rightly applied the maximum evaluation and beyond reasonable doubt test. Hence, appellate intervention was not necessary. (paras 12, 14 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu ('tertuduh') terhadap keputusan Mahkamah Tinggi dalam mensabitkan dan menjatuhkan hukuman bagi pembunuhan seorang bernama Siti Jainah ('si mati') di bawah s. 302 Kanun Keseksaan. Fakta menunjukkan bahawa tiada saksi mata bagi pembunuhan tersebut. Walau bagaimanapun, semasa dirawat di sebuah klinik untuk kecederaan yang dialami, si mati telah memberitahu staf klinik tersebut sebelum kematiannya bahawa beliau diserang oleh bapa saudaranya yang dikenali sebagai "Sailan". Polis telah menangkap tertuduh dan juga menjumpai keterangan yang boleh membabitkan tertuduh dengan pembunuhan si mati. Antara lain, jurisprudens berkenaan akuan nazak telah dihujahkan oleh pihak pendakwaan. Tertuduh, walau bagaimanapun, menghujahkan bahawa hakim bicara khilaf dari segi undang-undang dan fakta apabila beliau gagal mempertimbangkan, antara lain, bahawa (i) tiada keterangan perubatan atau bedah siasat untuk mengenalpasti bagaimana si mati mengalami kecederaan; dan (ii) pegawai perubatan yang telah mengenalpasti punca kematian tidak dipanggil untuk memberi keterangan.

A **Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)**
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

B **(1)** Adalah matan bahawa pembicara fakta bertanggungjawab untuk menilai kualiti keterangan dan menentukan sama ada keterangan yang direkodkan itu mewajarkan sabitan dan juga hukuman.

(2) Doktor yang mengesahkan bahawa si mati telah meninggal dunia tidak memberi keterangan memandangkan beliau berada di luar negara dan laporan beliau telah diterima masuk di bawah s. 32(1)(j) Akta Keterangan 1950 ('Akta'). Kes *Ismail Hussin v. PP* tidak menyatakan bahawa laporan bedah siasat dan punca kematian yang disahkan oleh pegamal perubatan adalah *sine qua non* untuk mengekalkan sabitan bagi pembunuhan. Punca kematian boleh, secara amnya, dikenalpasti melalui keterangan langsung atau kecederaan jelas atas tubuh badan walaupun laporan perubatan atau laporan bedah siasat boleh membantu pihak pendakwaan membuktikan punca kematian dan ia juga akan membantu mahkamah untuk memberi tumpuan terhadap isu tersebut selain daripada membuat inferens kemungkinan lain bagi punca kematian. Penemuan mayat mangsa atau sebahagian penting daripadanya, yang mempunyai tanda-tanda keganasan, adalah bukti yang mencukupi bagi kematian berunsur homisid.

(3) *Res gestae* dan akuan nazak merupakan pengecualian kepada kaedah dengar cakap dan apabila kenyataan itu, dengan jelasnya, menjurus kepada tertuduh, ia mempunyai kesan jelas bukan sahaja dalam pengecaman malah juga bagi punca kematian.

(4) Di bawah undang-undang England, akuan nazak bermakna kenyataan yang dibuat oleh si mati pada masa kematian berkenaan dengan punca kematiannya ataupun bagi sebarang transaksi keadaan yang menyebabkan kematiannya. Walau bagaimanapun, Akta Keterangan 1950 tidak mentakrifkan akuan nazak, konsepnya atau pengehadannya tetapi hanya membuat kenyataan sama dalam bentuk luas yang relevan. Seksyen 32(1)(a) Akta menangani kerelevanan kenyataan mangsa jenayah di mana punca kematian mereka menjadi suatu persoalan. Kenyataan itu mesti membutirkan punca kematian

mangsa ataupun transaksi keadaan yang menyebabkan kematian. Akta kita adalah luas dari segi skop berbanding dengan common law.

(5) Akuan nazak atau kenyataan s. 32(1)(a) adalah relevan dan boleh diterima masuk walaupun ia memungkiri kaedah dengar cakap. Alasan ini adalah berdasarkan maxim undang-undang "*nemo moriturus praesumitur mentire*" yang bermaksud bahawa seseorang yang akan meninggal dunia tidak akan menipu. Berdasarkan fakta, konsep *res gestae*, akuan nazak dan peruntukan di bawah s. 32(1)(a) dengan sendirinya telah membantu pihak pendakwaan untuk mengekalkan sabitan bagi pembunuhan di mana ia telah dipertimbangkan oleh yang arif hakim bicara melalui narasi kejadian untuk menarik jurisprudens relevan bagi mengekalkan pertuduhan. Terdapat material yang mencukupi untuk menyokong pertuduhan tersebut dan pandangan yang diambil oleh mahkamah bicara terhadap isu-isu relevan adalah munasabah. Mahkamah juga telah dengan betul menggunapakai penilaian maksimum dan ujian melampaui keraguan munasabah. Oleh itu, campur tangan rayuan tidak diperlukan.

Case(s) referred to:
Chin Kek Shen v. PP [2013] 7 CLJ 435 CA ***(refd)***
Ismail Hussin v. PP [1953] 1 LNS 33 HC ***(not foll)***
Nye and Loan (1977) 66 Cr App Rep 252 ***(refd)***
Pakala Narayana Swami v. King Emperor [1939] 1 LNS 62 PC ***(refd)***
PP v. Aszzid Abdullah [2008] 1 MLJ 281 ***(refd)***
Rama Nand v. State of HP AIR 1981 SC 738 ***(refd)***
Ratten v. R (1971) 3 All ER 801 ***(refd)***
Sharad v. State of Maharashtra AIR 1948 SC 1622 ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***
Teper v. R (1952) 2 All ER 447 ***(refd)***
Tong Kam Yew & Anor v. PP [2013] 4 CLJ 470 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 5, 6, 7, 8, 9, 14, 27, 32(1)(a), (j), 114(g)

Other source(s) referred to:
Hamid Sultan Abu Backer, *Janab's Key To Criminal Procedure and Evidence*, 2nd edn, pp 649-652

For the appellant - Rakhbir Singh; M/s Rakhbir Singh & Co
For the respondent - Farah Ezlin Yusop Khan; DPP

[Appeal from High Court, Tawau; Suit No: T-45-01-2007]

Reported by Kumitha Abd Majid

A

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant's/accused appeal in respect of conviction and sentence of death for murder came up for hearing on 15 May 2013 and we heard it on the same day and dismissed it. My learned brothers Ramly Haji Ali JCA and Mohtarudin bin Baki JCA have read the judgment and approved the same. This is our judgment.

[2] The appellant was charged for murder and the charge reads as follows:

> That you, on the 27th day of March 2006 at about 2.00 pm at Kampung Takada Pulau Bum Bum, in the District of Semporna, in the state of Sabah, did commit murder by causing the death of one Siti Jainah Binti Titing (F), 20 years old and that you thereby committed an offence punishable under Section 302 of the Penal Code.

Brief Facts

[3] In the instant case there was no eye witness to the murder. However, the victim after the injury had gone to the health clinic and had identified the appellant to the clinic staff and subsequently she died. The police arrested the appellant and also recovered incriminating evidence from the appellant to link the charge of murder. The learned judge has written a meticulous judgment collating the facts without any gap to sustain a charge of murder based on circumstantial evidence. The jurisprudence relating to dying declaration and the case of *Pakala Narayana Swami* was canvassed by the prosecution though learned counsel for the appellant was silent on this issue which was material and most relevant to the case. We do not wish to repeat the same in consequence of learned counsel for the appellant had only raised one issue before us, complaining that there was no post mortem report and no conclusive finding of cause of death. However, to deal with the issue the background facts are essential and we have taken the liberty to repeat the facts as adumbrated learned Deputy Public Prosecutor which was not challenged by learned counsel for the appellant and which *inter alia* reads as follows:

> (1) The deceased who lived at Kg Egang Egang on Pulau Bum Bum, Semporna had spoken over the telephone with her elder sister Siti Gapurah Binti Titing (PW1) who was then

working at Police Headquarters at Semporna. Siti Gapura testified that she had arranged to meet the deceased to bring with her a gold heart shaped locket belonging to Siti Gapura.

(2) Pulau Bum Bum is not connected to Semporna town by road. A person wishing to travel from Pulau Bum Bum to Semporna must do so by boat.

(3) The deceased did not keep her appointment with her sister at Semporna as arranged. Instead, at about 2.30 pm on 27.03.2006 several of the staff of the Health Clinic at Pulau Bum Bum, namely Abdul Barain (PW7), Norazizah (PW8), Mohd Naudeh (PW9) and Whilermina (PW10) (the clinic staff) were sitting outside the clinic when they noticed a lady who was covered in blood collapse near the entrance of the clinic.

(4) On going to the lady's assistance the clinic staff found the lady was still conscious. They noticed she had injuries on her face and head. The clinic staff treated the injured lady. While being treated the lady, whom the clinic staff identified as the deceased, informed them that she had been attacked by her uncle whom she identified as "Sailan". While being treated at the Pulau Bum Bum Health Clinic the deceased requested one of the staff there, Whilermina (PW10) to contact her (the deceased's) sister at a telephone number given by the deceased so as to warn her sister and mother not to go to Pulau Bum Bum or get into a silver coloured Kancil car.

(5) Whilermina did not manage to contact the deceased's sister at the given number so the deceased gave Whilermina her house telephone number, and when someone answered the phone Whilermina relayed the message from the deceased. The staff at the Pulau Bum Bum Health Clinic then arranged to send the deceased to the Semporna Hospital. The deceased arrived at the Semporna Hospital later that afternoon. She was still unconscious when she arrived at the Semporna Hospital.

(6) On being informed about the deceased being sent to the Semporna Hospital, Siti Gaphura went there at about 3.30 pm to see her sister but did not manage to as the deceased was then receiving treatment in the emergency unit. However, Siti Ghapura saw the deceased's hands which were still moving. While the deceased was still being treated at Semporna Hospital, Siti Ghapura went to lodge a police report at the Semporna Police Headquarters. While she was

still there she was informed by Kpl Ujan ak Singan (PW6) the officer in charge of the Enquiry office there that he had received a phone call informing him that the deceased had died about 4.30 pm.

(7) On the same day at about 6.00 pm the accused was handed over to the Semporna Police Station by some members of the public in connection with this case. On Kpl Ujan ak Singan (PW6) enquiring what his name was, the accused identified himself as Bandahala Bin Undik. Kpl Ujan ak Singan then arrested the accused and put him into the lock-up.

(8) Insp Mohd Affendie bin Che Din the initial Investigating Officer into the case testified that he was handed the following items which were seized from the accused by the officer in charge of the enquiry officer at Semporna Police Station. The items included a gold heart shaped locket (Exh. P17) which was later identified by Siti Gaphura as belonging to her which she had asked the deceased to bring with her to Semporna; a receipt from a pawn shop (Exh. P57) entitled "Letter of Confirmation and Indemnity".

(9) The name of the pawn shop was "Tukang Emas K-100". The receipt from the pawn shop was made out in the name of Bandahala Undik and showed that the accused had been paid RM250.00 for selling a gold ring (Exh. P19B) and a gold bracelet (Exh. P19C) to the pawn shop.

(10) Also seized from the accused by the enquiry room officer and handed over to Inspector Affendie Che Din was a blue lady's purse (Exh. P18a) containing the deceased's identity card (Exh. P18b). Insp. Affendie testified that the other items seized from the accused by the enquiry room officer and handed over to him were a key chain with a car key which belonged to a Kancil car. Some money was also seized from the accused.

(11) Following investigations by the police Insp. Affendie recovered from the pawn shop the gold ring and bracelet mentioned in the pawn shop receipt. Siti Gaphura identified the gold ring and bracelet as belonging to the deceased.

(12) Acting on the information received from the accused, Insp. Affendie also located the scene of crime which was in a bushy area close to the Pulau Bum Bum health clinic. From the scene of crime the police recovered several items, namely, an umbrella (Exh. 14a), a pair of lady's shoes (Exh. P16a and b), a hair

band and a parang. Siti Gaphura identified the umbrella as belonging to her and a pair of lady's shoes and hairband as belonging to the deceased.

(13) Inspector Affendie also seized a silver coloured car at Kg Tanjung Baru on Pulau Bum Bum. On opening the Kancil car which he found locked, Inspector Affendie took possession of the gear knob and steering wheel as he said he found traces of blood on both these items. Inspector Affendie had also cut a piece of the cushion cover at the front seat of the Kancil car on which he observed same blood stains.

(14) The items that were seized by the Police in the course of investigation into this case were sent to the Chemistry Department at Kota Kinabalu for analysis. Some of the items seized were also sent to the Chemistry Department at Kuching for deoxyribonucleic acid (DNA) analysis.

(15) Other matter that needs mentioned here is the fact that no post mortem was conducted on the deceased. ASP Rosli bin Hj. Ariff (PW15) the Investigating Officer in this case testified that on being informed that the deceased had passed away, he went to the Semporna Hospital and requested for a post-mortem to be carried out on her but it was not performed on the deceased as the doctor was able to ascertain the cause of death from her injuries.

(16) The family of the deceased had also requested for no post-mortem to be carried out. The medical report on the deceased was however produced as an exhibit (Exh. P30) by the prosecution.

[4] The petition of appeal reads as follows:

(1) The learned judge erred in law/or in fact when he failed to appreciate that it was fatal in that:

(i) The post-mortem report was not tendered by the prosecution to ascertain the cause of death;

(ii) The medical officer who ascertained the cause of death was not even called to testify or offered to the appellant;

(iii) No medical or post-mortem evidence to ascertain what caused the wounds;

(iv) Without a medical or post-mortem evidence what could have been the possible weapon that could have caused the injuries, remains a doubt.

A (2) The learned judge erred in law and/or in fact when he failed to appreciate that the time of death was not ascertained:

(a) The medical report is silent on the issue.

(3) The learned judge erred in law and/or in fact when he failed
B to appreciate that the identity of the assailant was not ascertained.

(i) The dying declaration was completely unreliable.

(ii) Identification was by nick name.

C

(iii) No witnesses who resided at Kg Egang-Egang where the appellant resided, where the nick name was used were called. Not even 1 witness.

(4) The learned judge erred in law and/or in fact when he failed
D to appreciate the crucial importance of the arresting public including one Abdul San all of whom were never called to give evidence:

(i) No opportunity to cross examine them;

E (ii) Were they putting in the appellant as the fall guy;

(iii) Their motive and all other issues can never be verified as they were not even called by the prosecution to establish the narrative of the prosecution case;

F (iv) The unchallenged testimony of the appellant on the existence of Abdul San; and

(v) The existence of Abdul San was corroborated by PW29 that Abdul San handed over the appellant to the police.

G (5) The learned judge erred in law and/or in fact when he failed to appreciate that there is no link between the deceased and all the exhibits as no blood samples of the deceased was made available to PW2, the Chemist or to PW16 for DNA analysis.

H (6) The learned judge erred in law and/or in fact when he failed to appreciate that there is no link between the deceased and all the exhibits as no blood samples of the deceased was made available to PW2, the Chemist or to PW16 for DNA analysis.

I (7) The learned judge erred in law and/or in fact when he failed to appreciate that the pawn receipt (exh. P25) dated 28 March 2006 was fabricated as the appellant was in remand one day earlier on the 27 March 2006.

(8) The learned judge erred in law and/or in fact when he failed to appreciate that the crime scene was tempered with including the Kancil car and that this is fatal to the prosecution case.

(9) The learned judge erred in law and/or in fact when he failed to appreciate that there was no evidential basis to say that the appellant had attempted to run away.

(10) The learned judge erred in law and/or in fact when he failed to appreciate that there was no nexus between the parang and the appellant as:

(a) There was no fingerprinting done on the parang; and

(b) Neither chemist nor the DNA report showed any nexus of the weapon with the appellant.

(11) The learned judge erred in law and/or in fact when he failed to invoke s. 114(g) Evidence Act 1950.

(12) The learned judge erred in law and/or in fact when he failed to decide the case on the basis that the prosecution had failed to adduce the best evidence in this case.

(13) The learned judge erred in law and/or in fact when he failed to appreciate that no DNA was adduced in respect of the blood stains on the scarf that the deceased was allegedly wearing "no DNA profile was developed from the scarf..." despite the fact that there was massive amount of blood on the scarf.

(14) The learned judge erred in law and/or in fact when he failed to appreciate that scientific evidence or the absence of it had in fact demolished the prosecution case.

(15) The learned judge erred in law and/or in fact when he failed to appreciate that there was in fact no motive to link the appellant to the death of the deceased.

(16) The learned judge erred in law and/or in fact when he failed to appreciate that:

(i) There was conflict of evidence in the prosecution case and doubt existed pertaining to the scene of the crime.

(ii) No trace of blood stains on the exhibits as per the finding of PW2 in contradiction to the evidence of PW12.

(17) The learned judge erred in law and/or in fact when he failed to appreciate that s. 27 Evidence Act 1950 does not apply in view of the feeble evidence of the prosecution.

(18) The learned judge erred in law and/or in fact when he failed to appreciate that the prosecution had failed to establish the burden of proof at both stages, be it at the prosecution stage as well as at the end of trial.

[5] We have read the petition of appeal and appeal record and the submission of the parties in detail. We take the view the appeal must be dismissed. Our reasons *inter alia* are as follows:

(a) In the instant case the Burmese doctor who confirmed the victim was dead did not give evidence as it was said that he left the country and his report was admitted under s. 32(1)(j) of Evidence Act 1950. The said medical report reads as follows:

Name	:	Siti Jainah Binti Titing	Sex	:	Female
Age	:	21 years old	I/C	:	-
Address	:	Kg. Egang-Egang, Semporna.			

The above named patient was brought by M.A. (Klinik Kesihatan Bum-Bum) around 2pm, 27 March 2006.

History

Alleged assaulted in Pulau Bum-Bum? time.

Brought by M.A. (Klinik Kesihatan Bum-Bum) at 2pm and bring to A & E Department, Semporna Hospital at 3.15pm.

On Examination

(1) Left cheek deep cut wound about 6cm.
(2) Left back of ear about 5cm bone-deep.
(3) Left occiput about 6cm bone deep with haematoma.
(4) Left cervical about 3cm superficial.
(5) Sub mandible about 3cm superficial.
(6) Sub mandible about 3cm superficial.
(7) Two stab wounds back superficial about 1cm.

Other part of body and private part no injury marks.
Skull xray left parietal bone - crack fracture (+).

Cause of Death (Patient relative refuse post-mortem) A
Multiple slash wounds with haemorrhagic shock.

(Dr Tun Naing)
Medical Officer
Semporna Hospital
Sabah B

(b) Learned counsel for the appellant relied on the case of *Ismail Hussin v. Public Prosecutor* [1953] 1 LNS 33; [1953] MLJ 48 to assert the importance of medical evidence and the duty of strict proof. In our considered view the case of *Ismail bin Hussin* does not say a post mortem report and cause of death affirmed by a medical practitioner is a '*sine qua non*' to sustain a charge of murder. The cause of death can ordinarily be ascertained by direct evidence, or patent injuries on the body, etc,; though a medical report or post-mortem report would assist the prosecution to drive home the point of cause of death and also it will assist the court to focus on the issue rather than infer other probabilities for the cause of death as may be suggested by the defence. The case of *Ismail* has nothing to do with the facts of our case. A reproduction of few paragraphs of the case will show it has no relevance to the facts of our case. The said part of the judgment reads as follows: C D E

> One other point was taken on appeal. There was no direct evidence that the body examined by the medical officer at the post-mortem was the body of Omar. It was suggested that this is a fatal defect in the prosecution case, as in *Fazal Din v. Public Prosecutor* [1949] MLJ 123. The facts, however, are distinguishable. In that case there was no evidence that the *corpus delicti* had been sent to hospital. In this case there is the evidence of the Penghulu that he accompanied the body of Omar and the wounded survivor, Rifin, to the hospital at the same time and there were a number of other circumstances which exclude any real risk that the body examined was not that of Omar. F G H
>
> Nevertheless, it is a matter for adverse comment that all the routine modes of identification were omitted. It is not right that the court should have to comb the evidence or draw debatable inferences on such a point. It should have appeared on the face of the deposition, in case the medical I

A man was not available at the trial. If it was overlooked then, it certainly should have been made good at the trial. Any text book on medical jurisprudence begins the chapter on examination of the person, living or dead, with the question of identification. It ought to be brought home to
B Medical Officers and, more especially, to Deputy Public Prosecutors that if they omit such an elementary precaution they may raise either a question such an elementary precaution they may raise either a question as to their professional competence or an inference of irresponsible negligence.

C

The appeal is dismissed but the minor conviction will be formally amended to one for voluntarily causing grievous hurt by shooting and the sentence therefore reduced to three years.

D (c) It is well established that the recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. (see *Rama Nand v. State of HP* AIR 1981 SC 738). In addition, even if the body is not recovered, pure circumstantial evidence itself
E is sufficient to sustain a charge of murder. (see *Sunny Ang v. PP* [1965] 1 LNS 171; [1967] 2 MLJ 195).

(d) In the instant case the jurisprudence relating to *res gestae* and dying declaration forms the substantive evidence to drive home
F the charge of murder. *Res gestae* and dying declaration stands as an exception to the hearsay rule and when the statement clearly points to the accused it has a potent effect not only on the identification but also as to the cause of death. The jurisprudence and case laws has been articulated in '*Janab's*
G *Key To Criminal Procedure and Evidence*', 2nd edn. pp. 649 to 652 by Hamid Sultan bin Abu Backer and a part of it reads as follows:

Res gestae literally means things done. It refers to all facts so connected with a fact in issue, and are incidental to it.
H They are admissible as truth of its contents although they may be hearsay, or self serving statement and inadmissible in evidence. The *res gestae* principle is embodied in sections 6 to 9 and 14 of the Act. The statement in order to constitute *res gestae* can be made by the parties to the
I transaction or even by bystanders. However, the statement

should have been made at or about the same time the act was being done. Contemporaneity or spontaneity must be shown before the statement is made admissible. For example, A is accused of murder of B by assaulting him. Whatever was said by A or B or bystanders at the time of assault or shortly or after it, may be relevant as it forms part of the whole transaction.

The statements accompanying the act to be admissible should as far as possible be contemporaneous to the act in issue which it relates. Further, they should be spontaneously made so that there is no opportunity for fabrication. The whole purpose of the *res gestae* rules is to admit evidence of matters which are usually subject to some rule of exclusion, so as to enable the court to look at the events in the proper perspective.

[6] The leading cases which demonstrate the concept, application and limitations are many. To name a few are as follows: (i) *Ratten v. R* [1971] 3 All ER 801; (ii) *Nye and Loan* [1977] 66 Cr App Rep 252; (iii) *Teper v. R* [1952] 2 All ER 447.

Dying Declaration

[7] Under the English law a dying declaration means a statement made by a deceased at the time of dying as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. Strictly speaking, dying declarations are hearsay statements. However, they are admissible as a part of the common law exceptions, provided they satisfy the following conditions:

(a) made by the victim;

(b) under a settled hopeless expectation of death;

(c) the death of victim has intervened between statement and trial;

(d) the accused is charged with murder or manslaughter;

(e) the statement is complete and relates to the death;

(f) the person who made the statement would have been competent to give evidence if he had been alive.

[8] The Evidence Act 1950 does not define dying declaration, its concept or limitation or parameters save that it makes similar statements in the widest form relevant. In particular s. 32(1)(a) of the Evidence Act 1950 states:

> 32. (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

[9] Section 32(1)(a) deals with the relevancy of statements of victims of crime in which their cause of death is in question, in that case. The statement must be one which states the cause of the victim's death or state any of the circumstances of the transaction which resulted in his death. This subsection is the common law equivalent of the rules relating to dying declaration, which is an exception to hearsay rules. Our Act is much wider in scope than the common law. It is important to note under the Act: (i) a dying declaration envisaged by the Act can be introduced by the prosecution or the accused and that statement need not be from the person facing impending death at the time of making the statement; (ii) the statement is made admissible if made by a competent person but the probative value must pass the test of reliability taking into consideration the totality of the evidence, and the test of proximity gives added force to its probative value.

[10] Under the common law a dying declaration is a statement made by a dying person as to the cause of his death, or as to any circumstances which resulted in his death. However, our Act nowhere defines the term dying declarations. At common law a dying declaration is only admissible in criminal cases involving murder or manslaughter. However, under our Act s. 32(1)(a) is applicable both in civil and criminal cases. One major difference between the common law position and our Act is that under the

common law the dying declaration must have been made at the verge of death or hopeless expectation of death. However, under our Act it is not necessary that the statement must have been made at the verge of death. Under s. 32(1)(a) any statement as to the cause of his death or circumstances of his death made even before the expectation of death is relevant, under s. 5. If the statement is made before the verge of death, then some proximity needs to be shown in respect of the statement and death. The issue of proximity and death has been discussed in a number of cases. To name a few are as follows: (i) *Pakala Narayana Swami v. King Emperor* [1939] 1 LNS 62; [1939] 8 MLJ 59 (PC); (ii) *Sharad v. State of Maharashtra* AIR 1948 SC 1622.

[11] Thus, under the common law, *res gestae* and dying declaration has its distinguishing factors as stated earlier, before it is made admissible. Such restrictions are not in place in a s. 32(1)(a) statement and the threshold for the prosecution to satisfy to admit the statement is low in contrast to *res gestae* or dying declaration. When a statement under *res gestae* or dying declaration is made admissible at common law it has greater probative force in contrast to a statement under s. 32(1)(a) where the threshold for admissibility is low and the probative value may also be low.

[12] Dying declaration or a s. 32(1)(a) statement is made relevant in consequence becomes admissible notwithstanding it breaches the hearsay rule. The reason is based on the legal maxim '*Nemo Moriturus Praesumitur Mentire*' which means a person who is about to die would not lie. In the instant case the concept of *res gestae*, dying declaration, and the provision of s. 32(1)(a) by itself or in composite has strongly assisted the prosecution to sustain the charge for murder which has been appropriately considered by the learned trial judge through the narration of events to attract the relevant jurisprudence to sustain the charge.

[13] Even though the learned counsel had only raised one issue we have gone through the petition of appeal and record of appeal. We do not find any merits in the appeal.

[14] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there

A are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test. (see *PP v. Aszzid* B *Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v. PP* [2013] 4 CLJ 470; [2013] 4 MLJ 888; *Chin Kek Shen v. PP* [2013] 7 CLJ 435).

[15] In consequence it is a safe decision and appellate intervention C is not necessary. Appeal is dismissed. The conviction and sentence by the High Court is affirmed.

[16] We hereby order so.

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